DISCRIMINATION LAW:

EQUALITY IN THE PRIVATE SECTOR

2005-2006

Volume 3

Professor Denise Réaume

Faculty of Law
University of Toronto

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prefer members of its own denomination in hiring teachers is *ultra vires* of the Legislature of the Province. Reference is made to s. 93(1) of the *Constitution Act, 1867*, which provides:

> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:
>
> > (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

It was also argued that s. 8 in so far as it affects the hiring practices of the denominational school was *ultra vires* as affecting freedom of religion, a subject left to the Federal Parliament.

These arguments were rejected before the Board and also in the Courts below and I need not go into these questions in any detail. The rights of denominational schools in British Columbia were very limited at the time of Confederation. It has been said that they were limited to the right to exist (see Audrey S. Brent, The Right to Religious Education and the Constitutional Status of Denominational Schools (1974-75), 40 Sask. Law Rev. 239) and it was contended that nothing in s. 8 of the Code affected any such rights. It may be added that s. 22 protects such rights in any event. I would agree with Seaton J.A. in the Court of Appeal when he said:

> The final argument made by the appellants was that the Act was unconstitutional as legislation in relation to freedom of religion and as legislation contrary to s. 93(1) of the *British North America Act*. When s. 22 is interpreted in other than a narrow fashion, the constitutional arguments cannot be made -- freedom of religion remains and the right to separate schools continues.

The appellant fails on this ground and I would answer the constitutional question in the negative.

In conclusion I would say that the appeal must be dismissed with costs. I would not remit the matter to the Board; in my view, all essential facts were found and stated by it. The Board's order will be restored....

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Note: The issue in *Caldwell* of whether the Human Rights Codes prohibit the dismissal of teachers for what has been called "denominational cause" arises in the context of the constitutional protections provided for separate schools by s. 93 of the Constitution Act. Relying on s. 93, the courts have independently decided that the separate schools in Ontario had, prior to 1867, a right to dismiss for denominational cause which was preserved by s. 93. This was held, in *Re Essex County Roman Catholic Separate School Board and Porter et al.* (1978), 89 D.L.R. (3d) 445 (Ont. C.A.), to deprive a Board of Reference of jurisdiction to order the reinstatement of teachers fired for having married contrary to the teachings of the Catholic Church. In the Court of Appeal, Zuber J. suggested, however, that the teachers may have had a right to sue for damages for wrongful dismissal even though they had no right to reinstatement.

The constitutional issue has arisen again recently with amendments to the Education Act in Ontario. In *Daly v. Ontario (Attorney General)* 44 O.R. (3d) 349, the Ontario Court of Appeal declared s. 136 of the *Education Act*, R.S.O. 1990, c. E.2, to be of no force and effect because it violates the denominational guarantee contained in s. 93(1). S. 136 provided:

> 136(1) For the purpose of maintaining the distinctiveness of separate schools, the Roman Catholic separate school board may require as a condition of employment that teachers hired by the board after the ten school year period mentioned in subsection 135(6)* agree to

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* The reference in s. 136(1) to, "the ten school year period mentioned in subsection 135(6)" is a reference to the fact that when public funding was extended to Roman Catholic separate high schools a number of teachers, including non-Catholic teachers, who were then employed by the public school boards were designated and transferred to the Roman Catholic

> respect the philosophy and traditions of Roman Catholic separate schools in the performance of their duties.
>
> (2) Subject to subsection (1), and despite section 24 of the *Human Rights Code*, section 5 of the said code applies to ensure that such teachers employed by a Roman Catholic school board will enjoy equal opportunity in respect of their employment, advancement and promotion by the board.
>
> (3) If it is finally determined by a court that subsection (1) or (2) prejudicially affects a right or privilege with respect to denominational schools guaranteed by the constitution of Canada, subsections (1) and (2) are repealed, it being the intention of the Legislature that the remaining provisions of the Act are separate from and independent of the said subsections.

Section 24 of the *Human Rights Code* would allow a Roman Catholic school board to give a preference in hiring and promotion to Roman Catholics if it could be shown that this was a *bona fide* occupational requirement. The Court held that ss. (2) of s. 136 of the *Education Act* prevents the application of s. 24 of the Code, but that doing so violates s. 93. Application for leave to appeal this decision to the Supreme Court was denied.

As the next cases indicate, the argument that a denominational school should be free to discipline teachers for infractions of religious rules, even when that might otherwise constitute discrimination on a prohibited ground, has not been confined to "s. 93 schools".

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Garrod v. Rhema Christian Schools

(1991), 15 C.H.R.R. D/477

...

[5] Ms. Garrod began working as a supply teacher for Rhema Christian School in January 1983 (see: Ex. 2). ...

[Note: When she started with Rhema, she had twenty years experience as a teacher. She became a full time teacher at Rhema in 1986.]

[6] Rhema Christian School is an elementary school located in Peterborough, Ontario and operated through membership in the Peterborough Christian School Society, Inc. (see: Transcript, vol. I, p. 81 and vol. II, p. 191). It is also associated with the Ontario Alliance of Christian Schools which is composed of some seventy-five Christian schools (see: Transcript, vol. II, p. 192). Rhema is almost entirely funded by the parents of the children who attend and the other members of the Peterborough Christian School Society (see: Transcript, vol. II, p. 192). Non-sending parents pay a membership fee of $25 or $50 a person; the parent cost per family to operate the school in 1986 was $2,900 (see: Transcript, vol. II, p. 193). The Chairman of the School Board, Mr. Bangma, said that in his experience students who go to Christian schools come from middle- to lower-middle-class families, some of whom "would be called downright poor" and many of whom "have to struggle significantly in order to make the payments required" (see: Transcript, vol. II, p. 200). The only public funding that Rhema receives is a small grant for a French program; this grant is in the order of $500 to $1000 (see: Transcript, vol. II, p. 192).

[7] The affairs, constitution, and operation of the Peterborough Christian School Society, Inc. are set out in three by-laws all of which are dated May 5, 1983 (see: Ex. 6). Mr. Bangma testified that these by-laws were still in effect as of the date of the hearing of this complaint (see: Transcript, vol. II, p. 195). Members of the Society must indicate their agreement with these by-laws in writing and

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school boards in order to teach the large number of students who would be transferring from the public school system to the separate school system.

> 1) their hiring procedures show a preference for those whose lifestyles are compatible with Evangelical Christian doctrinal principles and;
>
> 2) one of the primary functions of the Christian Horizons group homes is to foster an Evangelical Christian environment; and
>
> 3) that all employees of Christian Horizons group homes from the Residence Director to the housekeeper, if any, are all essential personnel as regards the fostering of an Evangelical Christian environment in the group homes, regardless of the time of their work shifts and interaction with the residents of the group homes,

the respondent will fail, as they have in the two complaints in this case, both elements of the objective part of the *Etobicoke* BFOQ test. It must be added, however, that because the evidence presented demonstrated to me that the administration of Christian Horizons and its membership is primarily Evangelical Christian in nature, therefore, there could exist a valid religious conformance BFOQ with many, if not most, of the positions in the administration and membership organizations of Christian Horizons.

This Board concludes that if the individual right of equality in employment and the group right of religious association, especially in the context of an Evangelical Christian organization like Christian Horizons, are each given their due weight, the complex balance of justice between individual and group rights can be struck under the Ontario *Human Rights Code*. ...

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Note: In *Trinity Western University v. British Columbia College of Teachers* [2001] 1 S.C.R. 772, the exemption from human rights obligations enjoyed by religious educational institutions was use as something of a sword, rather than just a shield. TWU is a private university associated with the Evangelical Free Church of Canada. For some time it had offered a teacher training program in co-operation with Simon Fraser University. In the five year program, students spent the last year either at SFU or supervised by SFU faculty. TWU applied to the College of Teachers for accreditation for a program that would be conducted exclusively through TWU. Part of its reason was the desire that its program fully reflect its Christian world view. Its application for accreditation was rejected on the ground that it was contrary to the public interest to accredit a program offered by an institution that followed discriminatory practices. BCCT objected to the fact that all students and faculty at TWU were required to sign a statement of "Community Values", committing them to "refrain from practices that are biblically condemned", including *inter alia* "sexual sins, including pre-marital sex, adultery, homosexual behaviour, and viewing of pornography". TWU challenged the refusal to grant accreditation.

A majority of the Supreme Court, including McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ., held that BCCT's refusal to take into account the religious freedom interest of TWU was a mistake of law. The majority's reasons are summarized as follows in the headnote in the S.C.R.

> At the heart of the appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared by society generally. While TWU is a private institution that is exempted, in part, from the B.C. human rights legislation and to which the Canadian *Charter of Rights and Freedoms* does not apply, the BCCT was entitled to look to these instruments to determine whether it would be in the public interest to allow public school teachers to be trained at TWU. Any potential conflict between religious freedoms and equality rights should be resolved through the proper delineation of the rights and values involved. Properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute. The proper place to draw the line is generally between belief and

conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. Acting on those beliefs, however, is a different matter. If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT. In this way, the scope of the freedom of religion and equality rights that have come into conflict can be circumscribed and thereby reconciled.

Here, by not taking into account the impact of its decision on the right to freedom of religion of the members of TWU, the BCCT did not weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU. Consideration of human rights values in the present circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation. Even though the requirement that students and faculty adopt the Community Standards creates differential treatment since it would probably prevent homosexual students and faculty from applying, one must consider the true nature of the undertaking and the context in which this occurs. Many Canadian universities have traditions of religious affiliations. Religious public education rights are enshrined in s. 93 of the *Constitution Act, 1867*. Moreover, a religious institution is not considered to breach B.C. human rights legislation where it prefers adherents of its religious constituency. It cannot be reasonably concluded that private institutions are protected but that their graduates are *de facto* considered unworthy of fully participating in public activities. While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the public school system. There is nothing in the TWU Community Standards, which are limited to prescribing conduct of members while at TWU, that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. The evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct. In addition, there is no basis for the inference that the fifth year of the TWU program conducted under the aegis of SFU corrected any attitudes which were the subject of the BCCT's concerns. On the evidence, the participation of SFU had nothing to do with the apprehended intolerance from its inception to the present. Rather, the cooperation was intended to support a small faculty in its start-up stage.

L'Heureux-Dubé J. dissented. Her reasons were summarized as follows:

The BCCT's decision not to accredit a free-standing TWU teacher-training program should be upheld. The BCCT's conclusion that TWU's Community Standards embodies a discriminatory practice is not patently unreasonable. Signing the contract makes the student or employee complicit in an overt, but not illegal, act of discrimination against homosexuals and bisexuals. It is not patently unreasonable for the BCCT to treat TWU students' public expressions of discrimination as potentially affecting the public school communities in which they wish to teach. Although tolerance is also a fundamental value in the Community Standards, the public interest in the public school system requires something more than mere tolerance.

... It is reasonable to insist that graduates of accredited teacher training programs be equipped to provide a welcoming classroom environment, one that is as sensitive as possible to the needs of a diverse student body.

The modern role of the teacher has developed into a multi-faceted one, including counselling as well as educative functions. Evidence shows that there is an acute need for improvement in the

experiences of homosexual and bisexual students in Canadian classrooms. Without the existence of supportive classroom environments, homosexual and bisexual students will be forced to remain invisible and reluctant to approach their teachers. They will be victims of identity erasure. The students' perspective must be the paramount concern and, even if there are no overt acts of discrimination by TWU graduates, this vantage point provides ample justification for the BCCT's decision. The BCCT's decision is a reasonable proactive measure designed to prevent any potential problems of student, parent, colleague, or staff perception of teachers who have not completed a year of training under the supervision of SFU, but have signed the Community Standards contract. The courts, by trespassing into the field of pedagogy, deal a setback to the BCCT's efforts to ensure the sensitivity and empathy of its members to all students' backgrounds and characteristics.

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Nixon v. Vancouver Rape Relief Society

2002 BCHRT 1

Note: For the facts of the case, see the decision in Chapter 3, p. 109 (*Vancouver Rape Relief Society v. British Columbia (Human Rights Commission)*. You may also find it useful to refresh your memory about the part of this Tribunal decision concerning the BFR issue included in Chapter 6, p. 490.

...

Is Rape Relief entitled to rely on the exemptions contained in s. 41 of the *Code?*

[208] In its final argument, Rape Relief submits that it did not contravene the *Code* because it is covered by the "sex" and "political belief" exemptions in s. 41, which provides, in part, as follows: If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by ...a common...sex...[or] political belief, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

[209] The parties do not dispute that Rape Relief is a charitable organization, not operated for profit. Where they disagree is whether Rape Relief has as "a primary purpose" the promotion of the interests and welfare of an identifiable group characterized by a common sex as well as a common political belief.

[210] Provisions like s. 41 exist in all human rights statutes in Canada. They assure the fundamental freedom of individuals, guaranteed by the Charter, to associate for the particular purpose of expressing particular views, or engaging in particular pursuits outside the antidiscriminatory norm otherwise mandated by human rights statutes. (*Brossard (Town) v. Quebec (Commission des droits de la personne),* [1988] 2 S.C.R. 279; 53 D.L.R. (4th) 609)

[211] Section 41 operates as a limited exemption from the application of the Code. It is an exemption available to organizations which have a particular, primary purpose. I am required to interpret the exemption section in light of the stated purposes of the *Code* in s. 3. While limitations on rights in statutes of general application like the *Code* are normally restrictively interpreted, because s. 41 is also a rights-granting provision, it is not subject to a restrictive interpretation. (*Re Caldwell and Stuart* (1984), 15 D.L.R. (4th) 1 (S.C.C.) at pp. 19-20)

[212] However, s. 41 does not grant a blanket exemption from the Code's obligations to an organization that grants a preference to an identifiable group; rather it permits an exemption where the organization has as a primary purpose the promotion of the interests and welfare of that identifiable group. In *Gould v. Yukon Order of Pioneers,* [1996] 1 S.C.R. 497, 170 D.L.R. (4th) 1

carry out such document reviews and needs assessments as the consultants consider necessary for the preparation of those programs.

3. As to Monitoring and Reporting

[95] A proper interpretation of the orders read in light of the decisions of 1998 and 2002 reveals the intention that the third party appointed pursuant to Order 14 of the decision on implementation has the exclusive responsibility for the monitoring of the entire change process, and it is the ruling of this Tribunal that the Ministry has no monitoring function in respect of any aspect of that process.

[96] By reason of Order 14, the third party is to report to the Tribunal "at intervals no shorter than six months", copies of which reports are to be provided to the parties (and, now, to the intervener as well). However, in view of the difficulties already encountered, and because these reports serve as the best source of information to the parties (who are to be at arm's length from the third party), I am of the view that the reporting interval should be shorter for the foreseeable future. Thus, it is this Tribunal's ruling that the third party consultants report to the Tribunal on a quarterly basis. That ruling may be reviewed in one year's time at the request of the consultants or the parties. Since it is not appropriate for the third party to approach the Tribunal through any of the parties, the consultants may contact me at any time through the office of the Tribunal's Registrar, a copy of which communication will be provided to the parties.

...

Note: At the same hearing, the Tribunal also gave intervener status to O.P.S.E.U., the union representing most of the employees affected by the consultant's work, stipulating as follows:

The Union, as it requested, was granted limited intervener standing "for the purpose of representing the interests of bargaining unit members as they are affected by and benefit from the systemic remedies" through making suggestions about the design and implementation thereof. However, such intervener status is not to be read as clothing the Union with any responsibility for, or authority over, the implementation process. In the course of representing the interests of its members, the intervener may make submissions to the Tribunal that do not unduly delay the proceedings or prejudice the parties, but it may not call evidence or participate in the examination or cross-examination of witnesses.

However, in a previous decision, the Tribunal rejected an application from Brian Scott, Senior Investigator with the Ministry's Independent Investigations Unit for intervenor status to address remedial questions. ((2001), 41 C.H.R.R. D/234) Mr. Scott requested that he be permitted to intervene on the grounds that evidence given by Dr. Agard could directly affect his employment, because Dr. Agard had recommended that the Independent Investigations Unit be abolished. The Tribunal held that Mr Scott's interests could be adequately defended by the Ministry. More recently, the Tribunal also rejected an application for standing by two employees of the Ministry. ((2005), CHRR Doc. 05-573) In the course of one of the hearings, these employees were alleged to have said derogatory things about Mr McKinnon. This evidence was offered in the context of dealing with the issue of the nature of the systemic remedies needed in the case. In rejecting the application, the Tribunal said,

[22] It is inevitable in lengthy and prolonged proceedings such as this that negative and/or adverse findings be made against persons who are neither parties to nor witnesses therein. If such findings are dictated by the evidence and are essential to the resolution of an issue, if they are not simply gratuitous, then most certainly the Tribunal has jurisdiction to make those findings; indeed, "the duty of the tribunal is to reach that conclusion if those facts are relevant to the decision". Thus, in my view, it is not open to the Tribunal to declare that it lacks jurisdiction either to make negative

or adverse findings of fact regarding non-parties or non-witnesses or to make orders that may have a negative impact on them in terms of employment or otherwise.

...

[24] I have no doubt that acceding to Ms. Gupta's motion to grant standing to Mr. Duncan and Ms. Cybulski would result in undue delay in these proceedings. It has been alleged that they said certain things, evidence about which has been adduced by the Complainant, and it is Ms. Gupta's intention to recall those witnesses in order to cross-examine them—at least to the extent that an opportunity to review the transcripts suggests to her is required. She would participate in the examination of her clients as well. Not only would additional hearing dates be called for, but the need to accommodate the schedule of yet another legal representative would add to the logistical problems that have begun to overrun this hearing. While the evidence of Mr. Duncan and Ms. Cybulski regarding the incidents in question might assist the Tribunal in determining whether a systemic remedy of the kind the Complainant intends to seek is called for, it is entirely unnecessary for them to be granted standing as parties in order to obtain that assistance. Finally, neither of them has any overriding interest in the issues before the Tribunal.

[25] In my opinion, to grant standing to anyone who asks for it on the basis that evidence has been given that might cast aspersions on them, or otherwise show them in an unflattering light, would be to invite chaos. It seems to me that the evidentiary issue that concerns Mr. Duncan and Ms. Cybulski is simply whether the allegations made in Exhibit 42 are substantially true. Whether they are called as witnesses is up to the parties; but, if they are called, each will have ample opportunity to testify fully regarding the issue of fact that concerns him or her.

...

The Tribunal has also responded to a request to clarify the requirements of Order No. 8 of the 2002 decision: *Ontario (Ministry of Correctional Services) v. Ontario (HRC) No. 9* (2005), CHRR Doc. 05-368, 2005 HRTO 23.

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Action Travail Des Femmes v. C.N.R. Co.

(1987), 40 D.L.R. (4th) 193 (S.C.C.)

The judgment of the court was delivered by

DICKSON C.J.C.:—This case raises the important question whether a Human Rights Tribunal appointed under s. 39 of the *Canadian Human Rights Act,* 1976-77 (Can.), c. 33 (the Act), has the power under s. 41(2)(a) to impose upon an employer, in this case Canadian National Railways Ltd., a programme tailored specifically to address the problem of "systemic discrimination" in the hiring and promotion of a disadvantaged group, in this case women. I am content to adopt the vocabulary of the Report of the Commission on Equality in Employment (1984), authored by Judge Rosalie Abella (the Abella Report) and to describe such programmes as "employment equity programmes".

Action Travail des Femmes, a public interest pressure group originally funded by the federal government but now incorporated and financed independently, alleged that Canadian National was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the Act by denying employment opportunities to women in certain unskilled, blue-collar positions. Section 10 ... reads:

> 10. It is a discriminatory practice for an employer or an employee organization
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,